IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 21, 2007 Session

STATE OF TENNESSEE v. VERNON WAYNE MATTHEWS, JR.

Direct Appeal from the Criminal Court for Greene County
No. 06CR134 John F. Dugger, Jr., Judge

No. E2006-02313-CCA-R3-CD - Filed November 14, 2007

The Defendant, Vernon Wayne Matthews, Jr., pled guilty to one count of theft between $1000 and $10,000 and entered a "best-interest" guilty plea to one count of aggravated burglary. The trial court denied his request for judicial diversion and sentenced the Defendant to an effective sentence of three years in the county jail. The trial court further instructed defense counsel to return in sixty days to request alternative sentencing. The Defendant appeals his sentence determination. Upon review, we vacate the judgment of the trial court because the record does not indicate that the trial court considered alternative sentencing, including probation. We remand for a new sentencing hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Vacated and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Paul Whetstone, Morristown, Tennessee, for the Appellant, Vernon Wayne Matthews, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; Cecil C. Mills, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The Greene County Grand Jury charged the Defendant with aggravated burglary and theft of property valued between $1000 and $10,000. He pled guilty to theft, and he entered an *Alford* guilty plea to the aggravated burglary charge, asserting that a guilty plea was in his best interest but denying the charges. *See North Carolina v. Alford*, 400 U.S. 25 (1970). The Defendant stipulated that the following summary, prepared by Detective Sgt. Vincent Tweed of the Greene County

Sheriff's Department, would constitute the State's proof:

> On 04/06/06 Mr. Walter Doolittle reported that his residence at 320 West Pines Road Afton, TN had been burglarized with $4165 worth of items taken. Mr. Doolittle stated the items taken included HP photo smart 945 digital camera, X-Box and Sony Playstation 2 electronic game systems, Emerson dvd/vcr, JVC video camera, 50 assorted video games, clothes hamper, two hundred fifty dollars, Husquvarna chainsaw, Campbell hausfield air compressor and Cobra scanner. Mr. Doolittle reported seeing John Henry standing in roadway near his residence when he returned home. Mr. Dolittle also stated that he saw a Chevy Blazer with older male and a young male that looked like John Henry. Mr. Doolittle stated that he saw a clothes hamper in the vehicle that looked like the one taken during the offense. On 04/08/06 at approximately 146 PM Walter Doolittle reported that he had located a person who was in possession of his HP photo Smart 945 digital camera which was taken during the burglary. Deputy Randy Christy responded to Walmart in Greeneville. The person with the camera was identified as Orville Henry (John Henry's father). John Doolittle Jr. identified and recovered his camera from Orville Henry who told that he got it from John Henry/Vernon Matthews. Orville Henry indicated that John Henry was staying with Vernon Matthews in a trailer park. Mr. Henry indicated that Vernon Matthews drives a White Chevy Blazer. During the course of the investigation John Henry and Vernon were developed as suspects and they were located at 101 Oakland Trailer Park in Greeneville TN.
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> On 04/12/06 I (Det. Sgt. Vincent Tweed), Det. Capt. John Huffine, Det. Sgt. Danny Ricker, Det. Sgt. Steve Ratledge and evidence Tech Angie Weems went to 101 Oakland Trailer Park. Upon arrival I talked with Vernon and Wendy Matthews explained why we were there. At that time John Henry opened a window and stuck his head outside in a attempt to exit the residence. Mr. John Henry was confronted and encouraged to stay inside the residence. Vernon and Wendy Matthews gave verbal permission to search the residence. A search of the residence produced the following items that were taken as evidence: Kenwood car stereo/cd player, Nintendo Game Cube with three controllers, wires and three memory cards, ten game cube games, 1 empty case, pry bar, pure energy tank, TAC-5 Paintball gun with helmet, black tennis shoes (John Henry's). On 041206 after being advised Miranda rights John Paul Henry gave an incriminating statement of facts/ confessed to burglarizing the (Dolittle) residence with the assistance of Vernon Matthews. Mr. Henry stated "I went through the front door . . . we took video games, digital camera, old scanner, X-box, PS2 games, dvd/vcr, video camera, money, cloth hamper, game cube, PS2/X games (18-19 est.), blue air compressor, chainsaw red/orange. We loaded the stuff into the Blazer and went to Orville Henry my dad house. I sold him the camera from the Dolittle's for $40. I keep the games Game cubes that detective got from Oakland T P 101. All the other stuff went to Vernon's Brother in law . . . I gave Vernon Matthews 10-15 dollars for gas. We got drugs and money for the PS2, XBOX,

chainsaw, video camera, air compressor, dvd/vcr, 20 games. Vernon Matthews and I sold some of the games cube game (7) at Dixie Pawn on 04/11/06. We also opened a green caviler. We took a Kenwood Stereo from that car near wishing well waterfall (Davis Valley Doty's Chapel) area."

On 04/12/06 Mr. Vernon Matthews also gave incriminating statement of facts (see statement) that he assisted Henry with the burglary of the (Dolittle) residence by dropping Henry off . . . transported the stolen items . . . helped him get rid of the stuff. Mr. Henry's and Mr. Matthews' statements contains facts that the offenders would know. Items taken during the offense were linked to Mr. Henry and Mr. Matthews.

On 05/04/06 John Huffine and Angie Weems recovered a XBOX game, two controllers and three games from Robert James French who stated he received the items from John Henry.

On April 12, 2006, Detective Tweed interviewed the Defendant at which time the Defendant gave a statement, transcribed by Detective Tweed. The Defendant signed the statement, in which he explained how he allowed John Henry to live with him after John Henry was "kicked-out" of his own house by John Henry's father. On the day in question, the Defendant left to pick-up his wife, when he saw John Henry on the side of the road. John Henry told the Defendant to go to the Doolittle's house, drop him off, and return ten minutes later. The statement explained, "He said they had money. I picked him up w/ air compressor and cream colored clothes basket w/ XBOX/PS2 and games." John Henry then returned to the house and retrieved a chainsaw, a DVD/VCR, a cam-corder, and a digital camera.

At the guilty plea/sentencing hearing, the Defendant testified that he was illiterate, which explained why Detective Tweed wrote out the statement. The Defendant maintained that he did not go into the Doolittle's house. In describing his relationship with John Henry, the Defendant testified that John Henry was a childhood friend who asked to live with the Defendant and his wife until he could find permanent housing. The Defendant opined that, in hindsight, the decision to allow Henry to live with them was in error. The Defendant left his house on April 6, 2006, to pick up his wife from work at the Baileyton Terrace Apartments. Henry rode with the Defendant because the Defendant did not feel comfortable leaving Henry alone at his home.[1] The Defendant testified that, during the ride, Henry told the Defendant to stop so Henry could collect some money. The Defendant stopped his vehicle, Henry exited, and, after the Defendant drove a short way, he turned around to retrieve Henry. When the Defendant returned, Henry was in possession of a number of items. The Defendant further testified that he did not know the items were stolen at that time, only learning that fact later. He continued to exercise control over the items after he learned they were stolen, thus he pled guilty to theft.

[1]The Defendant later testified that, although he stated earlier Henry rode with him from his house, in actuality, the Defendant picked up Henry from the side of the road.

The Defendant stated he worked at a farm, and he saved $600 to pay restitution to the victim. He is married with four children, and his mother lives at his house. The Defendant testified that, as a convicted felon, his chances of obtaining further employment were not good.

On cross-examination, the Defendant stated Henry had been living with him for three weeks before April 6, 2003, and the Defendant continued to allow Henry to reside at his house even after he learned of the theft. The Defendant testified that, after the burglary, he dropped off Henry at his house and returned to pick-up his wife at work. The Defendant ultimately picked-up his wife over an hour late, and he admitted that the trip to the Doolittle's was more important than picking-up his wife. Henry asked the Defendant where he might "get rid of" the items, and the Defendant took Henry to his brother-in-law. Henry traded the items for marijuana, but the Defendant stated he was not present when the transaction was made. As the District Attorney read a portion of the Defendant's statement to him, the Defendant testified that there were portions of the statement that Detective Tweed wrote down but did not read to the Defendant prior to the Defendant signing the statement. The Defendant admitted that he was not really paying attention to the statement as Detective Tweed read it to him because he was hungry and thirsty.

Sue Shrove, the Defendant's sister, testified that the Defendant has never been an "outlaw" and he was a good person who took care of his kids. He got in trouble in this case because he was trying to help a friend in need. The Defendant saved $1000, but he had to spend $400 on the Defendant's mother who has chronic heart failure. The remaining $600 would be used to pay restitution.

John Doolittle testified that he was a student, working at McDonalds. Doolittle testified that his father picked him up from school on April 6, 2006. When they arrived home, Doolittle went to his room to find it "torn all to pieces." They noticed a number of things missing, including Doolittle's game collection, which took him four years to acquire. Doolittle testified, "I felt like I didn't have anything else to work for. I mean, after all that effort that I made to take, and now it's gone. I didn't – I felt like it was pointless to try and restore everything I've ever done." Doolittle and his father called the police and waited for them at the top of his driveway. As they were standing there, Doolittle noticed a white Chevrolet Blazer driving by his house with his clothes hamper in the back. They got into his father's truck and attempted to follow the Blazer, but they lost track of it a short time later.

Doolittle further testified that no one contacted him to explain where his property was. He explained that he was working a double shift the Saturday after the burglary when a man set a camera on the counter as he was ordering. Doolittle noticed the camera was his and questioned the man about it. The man, Orville Henry, stated he obtained the camera from "Vernon at Porter's" for fifty dollars. Orville Henry told Doolittle that "Vernon" drove a white Blazer, and he gave Doolittle the camera before he left. Doolittle testified that his home does not feel the same after the burglary.

On cross-examination, Doolittle testified that neither the Defendant nor John Henry had been to his house before. Doolittle believed that the Defendant should spend time in jail for his actions.

The State asked the trial court to take judicial notice that, over the last two days, there were eighteen cases listed on the local docket, five of which dealt with aggravated burglary and theft. The Defendant objected, claiming the request addressed general deterrence. The court overruled the objection, stating he would observe the docket because it would "serve the interests of the public as well as the others accused and [ ] it's a deterrence value to other people to commit the same offense."

Detective Vincent Tweed testified that he interviewed the Defendant and wrote a formal statement for the Defendant to sign. He did not make-up anything in the statement, and, after he wrote the statement, he read it to the Defendant who made no corrections before signing it. On cross-examination, Detective Tweed testified that he did not realize the Defendant was illiterate at that time. Detective Tweed testified that all of the victim's property was not recovered.

Upon conclusion of the testimony, the trial court noted that the Defendant had requested judicial diversion, and that the factors to be considered are stated in *State v. Parker*, 932 S.W.2d 945 (Tenn. Crim. App. 1996). The court determined the Defendant was amenable to correction, but the circumstances of the offense weighed against judicial diversion. The court noted the victim lived in a modest home and was an eighteen year old working at McDonalds for $5.62 per hour. The court stated that this was a home invasion, "a man's home is his castle," and the victim testified his home was not the same anymore.

The trial court further stated that it believed the Defendant knew what was happening when the Defendant dropped off John Henry at the Doolittle's. Additionally, the court found that the Defendant provided the means to dispose of the stolen property. Most of the property has not been recovered, and that "weighs heavy in this case." The court noted that the Defendant had little in the way of a criminal record, which also supported his amenability to correction.

The court stated that, although the Defendant is married with children, he has had "sporadic" employment, which demonstrates a "problem somewhere." The Defendant appeared to be in good mental and physical health, but he appeared to be illiterate despite his graduating from high school. The court next found there to be a need for deterrence because "[a] man's home is his castle"; burglaries involving homes should be especially deterred. The court added that judicial diversion would not serve the ends of the public as well as the accused, and it believed the Defendant knew more than to what he was testifying. The court determined judicial diversion should not be granted based on these factors but that defense counsel should return after the Defendant spent sixty days in jail to request alternative sentencing. The court then added, "One thing I did fail to mention is that you contradicted the detective through this that you claimed he didn't say the things and he said he read it to you verbatim and that you agreed to it. And I think that weighs heavy that I think you were dishonest with the Court about the statement." The trial court sentenced the Defendant to two years in jail on the theft conviction to run concurrently with a three year jail sentence it imposed on the aggravated burglary conviction.

II. Analysis

On appeal, the Defendant alleges the following: (1) the trial court abused its discretion when it denied his request for judicial diversion; (2) the trial court erred when it denied his alternative request for full probation and sentenced him to three years confinement.

A. Judicial Diversion

The Defendant argues that the trial court erred when it denied judicial diversion because it failed to properly weigh all the factors that courts must consider in reviewing a petition for judicial diversion. When a defendant challenges the denial of judicial diversion, we review the trial court's decision under an abuse of discretion standard. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). We must conclude that "no substantial evidence exists to support the ruling of the trial court" if we are to grant the Defendant relief. *Id.*

Judicial diversion falls under Tennessee Code Annotated section 40-35-313(a)(1)(A), pursuant to which a judge can defer proceedings without entering a judgment of guilty. The defendant would be placed on probation, but he would not be considered a convicted felon. T.C.A. § 40-35-313(a)(1)(A) (2006). To be eligible for judicial diversion, a defendant must have pled guilty to, or been found guilty of, a Class C, D, or E felony and must have not previously been found guilty of a felony or Class A misdemeanor. T.C.A. § 40-35-313(a)(1)(B)(I). In the case under submission, the trial court found that the Defendant was eligible for judicial diversion based on these requirements. However, eligibility in and of itself does not entitle a defendant to judicial diversion. *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000).

Once a defendant is deemed to be eligible for judicial diversion, the trial court must consider several factors when deciding whether or not to grant judicial diversion. Due to the similarities between pretrial diversion — determined initially by the District Attorney General — and judicial diversion, courts draw heavily from pretrial diversion law and examine the same factors:

> [A court] should consider the defendant's criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Cutshaw, 967 S.W.2d at 343-44. Additionally, "a trial court should not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration." *Id*. (citing *Bonestel*, 871 S.W.2d at 168).

We initially note that all parties are in agreement, and the presentence report indicates, that the Defendant has never been convicted of a Class A misdemeanor or any other felony. Thus, he is eligible for judicial diversion. Next, in analyzing whether to grant judicial diversion, the trial court found that a number of factors weighed against judicial diversion. The trial court focused on the circumstances of the offense. This was a home invasion, the property has not been recovered, and the victim was a young man working at McDonalds to pay for his property. The court also noted that the Defendant did not appear to be truthful in his description of his interview with Detective Tweed and his testimony concerning whether he knew Henry was burglarizing the Doolittle's house. Further, the court found the Defendant had "sporadic" employment, and judicial diversion would not serve the best ends of the public and the accused. Finally, the court also found confinement would serve as a deterrent to similarly situated local individuals. The court also found a number of factors weighed in favor of judicial diversion, *to wit*, the Defendant was amenable to correction, he had good physical and mental health, and he had a good home life.

The Defendant primarily focuses his argument on the court's consideration of the docket for deterrence purposes. In *State v. Nunley*, this Court determined that over 300 indictments in two years for the sale of controlled substances did not "*ipso facto* establish that a need for deterrence existed." 22 S.W.2d 282, 288 (Tenn. Crim. App. 1989). The Court explained the basis for its conclusion as follows:

> The trial court did not interpret the meaning of, nor provide any perspective for, the 300 drug-cases, and we are unable to glean from the record pertinent facts, such as whether any of the indictments resulted in convictions, the total number of offenders who were indicted, whether the alleged offenses originated in small clusters of population concentration, or whether the number was excessive compared to other similar localities during the same time period.

Id.

In *Hooper*, the Court stated that "since the 'science' of deterrence is imprecise at best," trial courts should consider the following factors in weighing the deterrence issue:

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole;
> (2) Whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior;
> (3) Whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case;
> (4) Whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective;
> (5) Whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in

previous arrests or conviction.

Hooper, 29 S.W.3d at 10-12. The Court added, however, that "[t]hese factors are meant to serve only as a guide, and a court need not find that all these factors are present before ordering incarceration based on a need to deter similar crimes." *Id.* at 12. In the case under submission, there is evidence in the record that satisfies *Hooper* factors one, two, and four – proof of other incidents in the community of aggravated burglaries and theft, the Defendant's statement that he aided in the disposal of the property after he learned it was stolen, and the Defendant aided John Henry in the criminal objective. We conclude the trial court properly used the need for deterrence as a factor in denying judicial diversion.

The Defendant next argues the trial court erred in relying on the fact that this was a home invasion, and as the Defendant states it in his brief, "the Trial Court opined that Judicial Diversion should never be an option in cases involving home burglaries." The Defendant's conviction of aggravated burglary under Tennessee Code Annotated section 39-14-403 addresses burglary of a habitation. This is a separate crime from burglary, T.C.A. § 39-14-402 (2006), evincing a specific contemplation that those convicted of burglary of a habitation should be considered for judicial diversion. Thus, it would be inappropriate to base a denial solely on that fact. We agree. It was error for the trial court to rely on the fact that this was a home invasion because the legislature has specifically determined that even those convicted of burglary of a home are eligible for judicial diversion.

However, we conclude that there is substantial evidence to support the trial court's conclusion that the Defendant's lack of candor and the need for deterrence warrant a denial of judicial diversion. *See Nunley*, 22 S.W.3d at 289 (concluding, even in the face of errors, lack of candor alone is sufficient basis to deny judicial diversion). "The trial judge is in the best position to assess a defendant's credibility and potential for rehabilitation. A defendant's potential for rehabilitation 'should be considered in determining the sentence alternative or length of a term to be imposed.'" *Id*. (quoting T.C.A. § 40-35-103(5) (1997)). Accordingly, the Defendant is not entitled to relief on this issue.

B. Full Probation

The Defendant argues that the trial court erred when it denied full probation because the State did not prove that confinement would be more suitable than the statutory presumption of alternative sentencing. When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act,

T.C.A. § 40-35-103, we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and/or sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf, and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210; *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

Our review of the record indicates that, at the sentencing hearing, the trial court failed to consider whether probation was appropriate. The trial court clearly addressed whether the Defendant should receive judicial diversion, but with regards to probation, the court merely instructed defense counsel to return after the Defendant had served sixty days and to "approach me about alternative sentencing." This precludes a meaningful review of the trial court's decision as to whether the Defendant is an appropriate candidate for alternative sentencing, including probation. *See* T.C.A. § 40-35-303(b) (2006) ("[P]robation shall be automatically considered by the court as a sentencing alternative for eligible defendants . . . ."). We recognize that Tennessee Rule of Criminal Procedure 35(a) allows for a motion to reduce a sentence, but, in our view, that rule requires the trial court to have affirmatively addressed all the statutory requirements initially. *See* Tenn. R. Crim. P. 35(a) ("The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation."). Thus, the case is remanded to the trial court for it to determine whether the Defendant is entitled to alternative sentencing, including a determination as to the merits, if any, of the Defendant's request for full probation.

III. Conclusion

In accordance with the foregoing authorities and reasoning, we vacate the judgment of the trial court sentencing the Defendant to an effective three years confinement. We remand the case for further proceedings consistent with this opinion.

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ROBERT W. WEDEMEYER, JUDGE